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Submitted with the Consent of the Parties

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No 73-1279

THE WILLIAMS & WILKINS CO.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF THE SPECIAL LIBRARIES ASSOCIATION

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QUESTION PRESENTED

The true question[1] posed in this case, and that which clearly affects the interests of the Special Libraries Association (the "SLA"), is:

> Whether not-for-profit academic, research, and public libraries are liable for copyright infringement as a result of their long-standing practice of making single photocopies of portions of copyrighted works at the request and for the use of readers engaged in scientific and scholarly research.

1. Petitioner admits (see Petitioner's Brief at 29) that the decision of this Court on the facts here present will constitute precedent reaching well beyond the instant parties.

The SLA respectfully submits that the question set forth above represents the parameters of this case far more accurately than does the superficially narrow question framed by Petitioner.[2] The SLA urges this Court to consider the issues before it in their proper perspective—as vitally affecting the interests not only of governmental libraries but libraries of the private sector as well.

Interest of the Special Libraries Association

The Special Libraries Association (SLA), organized in 1909, is a non-profit educational corporation incorporated and existing under the laws of the State of New York. Its 8,500 members make it the second largest library and information-oriented organization in the United States.

The SLA represents more than 10,000 special libraries in the United States, including libraries and information centers maintained by corporations, associations, government agencies, and other individuals or groups. It further includes specialized or departmental collections within an academic or public library.

The objective of SLA is to promote and improve the communication, dissemination, and use of information in areas such as the physical, biological, technical and social sciences, and the humanities to the end that such information may serve the general welfare and the advancement of mankind. Specialized libraries emphasize specialized information services for a specialized clientele. The Legislative Reference Service of the Library of Congress and the Supreme Court of the United States Library are prime examples of the type of specialized libraries represented by SLA.

The interest of the SLA in the present case is directly related to its vital concern that access to informational resources be protected and preserved.

The SLA is convinced that a decision in favor of Williams & Wilkins will effectively limit access to information in journals

2. Petitioner's Brief at 2.

and periodicals which is absolutely essential to a functioning economy and society.

The essence of the claim asserted by Petitioner is that the making of a photocopy of a copyrighted work by a library for educational and scientific purposes is an infringement of copyright. Acceptance of this claim would effectively confine scientific, industrial, governmental, and academic research to a few major library collections and introduce an institutional parochialism utterly incompatible with the needs of our modern scientific and technological society. Moreover, it would deprive large segments of the public of the most current sources of information.

The realities of the present situation as regards dissemination of library periodical resources may be summarized as follows.

First, no single library has, or could afford to have, in its collection, no matter how large, all periodicals and journals. As a consequence, most meaningful research efforts involving journal or periodical information can be undertaken only if the collections of a number of libraries are accessible. Moreover, most research efforts cannot avoid recourse to information contained in journals and periodicals.

Second, full access to library collections of journals and periodicals is available only through photocopies. This is true because cost and space limitations dictate that libraries bind at most one or two copies and discard the rest. Libraries will rarely loan to a patron of another library a bound volume of periodicals because to do so would limit the access of its own patrons to such works.

Third, no copyright proprietor of periodical works has, until now, claimed the right to prohibit library photocopying in lieu of interlibrary loan. This, despite the fact that such practices prevailed when the Copyright Act of 1909 was enacted, were formalized in the first Interlibrary Loan Code in 1917, and have continued unquestioned for nearly sixty-five years.

Fourth, copyright proprietors of periodical works, with perhaps a bare handful of exceptions, have no capacity to provide reprints upon request and no administrative capacity to respond to requests for permission in a meaningful time frame. Many, if not most, copyright proprietors of periodical works do not even have complete sets of back issues of their own works.

Fifth, libraries will not make a photocopy in lieu of interlibrary loan if to do so would expose them to a suit for infringement and statutory damages. The cost of raising and sustaining the defense of "fair use" (unless library photocopying was *per se* a "fair use") alone would be prohibitive.

If the making of a library photocopy is an infringement of copyright, and is not *per se* a fair use of copyrighted material, then access to essential information becomes dependent entirely on the ability or willingness of the copyright proprietor to grant permission to copy or to provide a suitable reprint. There is no evidence, historical or otherwise, that copyright proprietors (with rare exceptions) are either willing or able to process requests for reprints or permissions on an individual single copy basis as is done by libraries. Nor are they required to do so under the copyright law. That law contains no provision for mandatory or blanket licensing of printed materials. Nor does it require the copyright proprietor to maintain copyrighted works in print and available. There is nothing in the copyright law to prevent the copyright proprietor from totally ignoring the requests of libraries and library users for access to his works if, in his absolute discretion, he deems a response uneconomic or inconvenient.

To ignore such requests is effectively to suppress access to the work. Moreover, suppression of access is tantamount, in the case of most journals and periodicals, to suppression of the work itself as an intellectual resource. The utility of a work, and hence its value, is not merely a function of its existence "somewhere" but of its availability "everywhere."

In substance, Petitioner is claiming the absolute right to suppress, at its will or at its whim, any journal or periodical work for which it holds the copyright. Petitioner cloaks that claim here under the disguise of a mere claim for reasonable compensation. But Petitioner cannot hide the true thrust of its ultimate goal—the ability to dictate its own economic terms because of its ability to *enjoin* any library photocopying done without the permission it seeks from this Court's decision.

We submit that neither the Constitution nor the Congress which enacted the Copyright Act of 1909 contemplated that the copyright law would or should vest such power in a copyright proprietor. Nor has such right ever been asserted or recognized in the history of copyright legislation.

In the past, when technological developments have seemed to jeopardize the economic interests of the author in his works, the Courts have looked to Congress to find an accommodation between those interests and the public interest in access to such works. SLA believes that to the extent photocopying may be deemed such a development, the same recourse is appropriate and readily available.

The decision of this Court in this case will determine for the foreseeable future whether this nation's vast wealth of periodical and journal literature will continue to exist as an information resource accessible to all who need to know. If Petitioner is allowed to prevail, access to knowledge, and hence educational opportunity, will become merely a function of geography.

SLA does not believe such a result is Constitutionally required or socially acceptable.

ARGUMENT

The arguments upon which SLA relies in its support of Respondent may be briefly enumerated.

First, the limited monopoly powers granted to copyright proprietors should be strictly construed in a manner consistent with

the Constitutional purpose of copyright, which is to promote—and not to impede—science and the useful arts.

Second, the Copyright Act of 1909 was not intended by Congress to extend to library photocopying practices in effect at the time of its enactment and continued without challenge openly and with full knowledge of copyright proprietors for sixty-five years thereafter.

Third, this Court has consistently refused to extend the copyright monopoly where the functions of the copyright proprietor are not the same as those of the alleged infringer. There exists a significant and fundamental functional distinction between publishing and library photocopying.

Fourth, even if library photocopying is found to be technically within the limited copyright monopoly, it should be excused as a reasonable and indispensable extension of the "fair use" defense traditionally available to scientists, researchers, and scholars seeking access to copyrighted works. That which such persons are entitled to do for themselves simply should not be impeded when done for them and on their behalves.

Fifth, if library photocopying practices are declared an infringement, interlibrary loan of journals and periodicals will effectively be suspended with the result that access to much of the world's most significant and current information and knowledge will become unavailable to those who need to utilize that information and knowledge.

The foregoing arguments of SLA are in summary essentially the same as those advanced by the American Library Association as Amicus Curiae in support of Respondent.

Since the American Library Association has developed these arguments in depth and comprehensively and has cited the Court to all relevant authority, SLA will not burden the Court with an independent but essentially duplicatory argument. Rather, SLA hereby adopts at its own and urges to this Court the arguments set forth at length in the Brief Amicus Curiae of the American Library Association.

CONCLUSION

The SLA respectfully submits that the Court should affirm the decision of the United States Court of Claims.

This Brief is filed with the consent of both parties. Letters of consent from each party are attached hereto as Appendices A and B.

Respectfully submitted,

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APPENDIX A

Law Offices
COWAN, LIEBOWITZ & LATMAN, P. C.
200 East 42nd Street
New York, N. Y. 10017

July 29, 1974

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Ill. 60601

Re: Williams & Wilkins Company v. United States, No.
preme Court Docket No. 73-1279

Dear Mr. North:

Pursuant to your request, petitioner, The Williams & Wilkins Company, consents to the filing of a brief *amicus curiae* in the above matter on behalf of the Special Libraries Association.

Sincerely yours,

/s/ ALAN LATMAN
Alan Latman

AL:DM

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Re: William & Wilkins Company v. United States, No. 73-1279

Dear Mr. North:

As requested in your letter of July 24, I hereby consent to your filing a brief amicus curiae in the above-captioned case on behalf of the Special Libraries Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General